AMAR KAUR RAM SINGH *a*

v.

NAJAR SINGH SAGAR SINGH

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. 24-506-89] *b*
29 JANUARY 1991

CIVIL PROCEDURE: *Custody and access to children - Supreme Court order on access to the children - Whether defendant's appeal to review certain conditions of the said order is to be based on Supreme Court order.*

On 5 September 1990 the High Court dismissed the plaintiff/applicant's application for custody *c* of the children who had all along been staying with the defendant/respondent.

On appeal the Supreme Court, after hearing full arguments on custody and access by both Counsels, dismissed the said appeal as regards custody. Some problems arose as regards the access in the finalisation of the draft order the relevant excerpt of which was subsequently amended on the instructions and approval of the Chief Justice of Malaya. *d*

Subsequent to the order of the Supreme Court the defendant/respondent applied to the High Court to review certain conditions of the Supreme Court order.

Held:
The Supreme Court order on access ought not to be disturbed. Accordingly, the defendant/ respondent's application was dismissed. *e*

[Each party to bear their own costs.]

Cases referred to:
T v. T [1966] 2 MLJ 302 ***(foll)***
Re F [an infant] [1969] 2 All ER 766 ***(foll)***

For the plaintiff/applicant - Karpal Singh; M/s. Karpal Singh & Co. *f*
For the defendant/respondent - Choy Kam Lee; M/s. K.C. Lai & Co.

JUDGMENT

Abdul Malek Ahmad J:

On 5 September 1990, I had dismissed the plaintiff/applicant's application for custody of her six children, who had all along been staying with the defendant/respondent, as I had doubts *g* in the light of the facts of this particular case as to whether the plaintiff/applicant was in a position to look after herself properly, let alone look after the six children, who had also expressed their desire to continue staying with their father who, in the last two years after their mother had left the matrimonial home, appeared to have taken good care of them judging from their appearance in my chambers and from their school and probation reports. I had also ordered that each party bear their own costs and that reasonable access to the plaintiff *h* was to be agreed between the parties.

I had also refused the plaintiff/applicant leave to appeal to the Supreme Court on 21 September 1990 but leave was subsequently granted by the Supreme Court and the appeal was heard on 6 February 1991. The Supreme Court, after hearing full arguments on custody and access from both Counsel, had decided to dismiss the appeal as regards custody but some problems *i*

arose as regards the access in the finalisation of the draft order the relevant excerpt of which was subsequently amended on the instructions and approval of the Chief Justice Malaya, to read as follows:

> ... **and it is also ordered** that the appellant be given access to her children on alternate weekends, one weekend at the appellant's expense at Ipoh Station Hotel and the other in Penang at appellant's residence at No. 108, Jalan Permai, Taman Brown, Penang at respondent's expense **and it is further ordered** that for the first half of each school holidays, the respondent do send the children to Penang at appellant's residence at No. 108, Jalan Permai, Taman Brown, Penang and to take them back at his own expense...

This meant that when the plaintiff/applicant came from Penang to Ipoh to be with the children at the Ipoh Station Hotel, she had to foot all expenses and on the alternative weekends, the defendant/respondent was responsible in bringing the children to Penang and back to Ipoh at his own expense.

The defendant/respondent has now applied by a summons-in-chambers filed on 17 August 1991 that the said access be:

> ... stopped, restricted or reduced to once in three months. Alternatively at the ferry terminal on the Penang side which is a neutral place or the Sikh temple in Bricklin Road or such neutral place in Penang be chosen for the children to be given access, alternatively all access if any be in Ipoh and the applicant shall have to bear all the cost of access ...

By consent of both Counsel, submissions were put in writing and after considering them and the authorities cited, my opinion was that despite the fact that the parties were at liberty to apply to the High Court by virtue of the Supreme Court order, the Supreme Court had in fact made the access order only six months before the application after having deliberated on arguments for both custody and access at the appeal. The Supreme Court order on access, as it stands, appears to be a very reasonable one and fair to both sides illustrating the fact that the Supreme Court had dealt and dwelt with the issue in its proper context after taking into consideration all factors. The defendant/respondent's main grouse is the inconvenience caused to him having to drive all six children up to Penang in a Proton Saga every alternative weekend and this duty becomes more burdensome to him by the fact that he has to deliver them to the plaintiff/applicant at her house.

To my mind, anything less than this arrangement would certainly not be fair to the other party. As has been held by Grill J (as he then was] in *T v. T* [1966] 2 MLJ 302 where he said:

> The general principle is that an order for access to the child will generally be made at the instance of a parent not having the child's custody unless it is in the child's interests to forbid access ... The question of access to children whose parents have parted is always a matter which causes the Courts a great deal of anxiety. The cardinal rule is that except in very exceptional cases it would not be right from the point of view of the child to cut him or her off from all access to either of the parents.

The defendant/respondent had made a number of allegations in his affidavit as regards the unhappiness caused to the children for the Penang access as a result of the plaintiff/applicant's unfriendly and hostile attitude towards them but these have to be viewed in the light of the plaintiff/applicant's latest affidavit filed one day before the decision enclosing photographs taken in January 1992 which showed the children with the plaintiff/applicant and her sister looking very happy being among themselves. As for the delivery of the children to a place in Penang other than the plaintiff/applicant's address, I cannot see any other solution as this would entail handing them over to some third party each time at a public place which may lead to other problems as regards safety and who the third party should be.

As has been decidedly declared in *Re F [an infant]* [1969] 2 All ER 766 namely:

> But I think that her failings as a wife have not made her so bad a mother as to displace the greater need that young children have for the mother rather than the father, and her ability to satisfy that need.

my view is that the plaintiff/applicant should not be deprived of the need and right to be with her children once a fortnight especially so when it is not disputed that she is not coming to Ipoh any more for the Ipoh access.

As my finding based on these considerations was that the Supreme Court order on access ought not to be disturbed, I had accordingly dismissed the application with each party to bear their own costs.

Also found at [1992] 2 CLJ 807